

Civil Liberties Have Been Compromised by the Patriot Act

America's Battle Against Terrorism, 2005

Michael Stern, a former journalist and English professor, is the head of the technology transactions group at Cooley Godward law firm.

In an America that remains as politically polarized into [liberal and conservative] states as it was in 2000—despite the [terrorist] attacks on September 11, 2001—the Bush administration's counterterrorism measures have created one striking, if unanticipated, consensus. Our three authors aren't people who would be expected to agree with each other about much. Nat Hentoff, the renowned jazz critic and longtime columnist for *The Village Voice*, has for decades championed free speech and opposed the [national security](#) state's efforts to squelch it. Philip Heymann, now [in 2004] a professor at Harvard Law School, ran the criminal division of [former U.S. president] Jimmy Carter's Justice Department and served as [former U.S. president] Bill Clinton's deputy attorney general. James Bovard is the libertarian policy adviser to the Future of [Freedom](#) Foundation, a winner of the National Rifle Association's Freedom Fund Award, a longtime contributor to *The American Spectator*, and a scourge of Bill Clinton's purported abuses of power. So what do these exemplary voices of left, center, and right agree about? That the USA Patriot Act (and the Bush administration's increasingly aggressive assertion of executive authority to curtail or eliminate judicial review of decisions about whom to surveil, interrogate, detain, and prosecute for what conduct) represents a dangerous, unprecedented—and above all, unjustifiable—threat to civil liberties.

Each author arrives at the ground he shares with the others from a different direction, of course, and that ground is a complex Venn diagram of intersecting indictments and policy prescriptions. Their sobering conclusions about the impact of the "war on terror" on American [democracy](#) have three core elements in common:

Undermining Constitutional Checks and Balances

As [former U.S. president] James Madison famously wrote in *The Federalist Papers* (No. 47): "The accumulation of all powers, legislative, executive and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." The net effect of the Bush administration's post-9/11 antiterrorism campaign has been to massively concentrate power and authority in the executive branch, while seeking to conceal the results of this process.

The Patriot Act defines "domestic [terrorism](#)" as "activities that involve acts dangerous to human life that violate the laws of the [United States](#) or any state [and] appear to be intended to: (1) intimidate or coerce a civilian population; (2) influence the policy of a government by intimidation or coercion; or (3) affect the conduct of the government by mass destruction, assassination, or kidnapping...." The sweeping vagueness of phrases such as "dangerous to human life," "appear to be intended," and "intimidate" could capture many forms of political protest—enabling the government, as Hentoff

points out, to surveil, detain, interrogate, and ultimately charge as a terrorist anyone who provides any assistance to others engaged in purportedly terrorist activities, however innocuous such assistance might be. Examples (from Bovard): Eyad Alrababah, a Palestinian living in Connecticut, voluntarily contacted the Federal Bureau of Investigation after 9/11 to tell the agency that he had met four of the hijackers and given them a ride to Virginia in June 2001. He was arrested and held incommunicado in solitary confinement for over four months for his trouble. There was also the barakaat (a money transfer service used by Somali [immigrants](#) in the U.S.) in a Seattle strip mall that was raided as a putative financial arm of terrorist organizations and stripped of all its contents (including the coffee makers, food, and baked goods from its accompanying minimart). It took more than six months and the intervention of Senator Patty Murray (D-Washington) for the owner to recover the cash seized in the raid (which turned up no evidence of any wrongdoing); he was never compensated for the interruption of his business or the loss of his inventory and equipment.

The Patriot Act permits [searches and seizures](#) without immediate notification of the target (notice can be delayed for at least 90 days) and [wiretapping](#) (including the surveillance of e-mail) on the basis of a declaration that the information sought is "relevant to an ongoing criminal investigation" rather than the Fourth Amendment standard of probable cause. The act also authorizes the FBI to secretly obtain the books and records of any person or organization—most notoriously, bookstores' and libraries' information about their patrons' reading and Internet browsing habits—and to preclude any disclosure of the request. Each FBI office may issue these "National Security Letters," which do not require a court order of any kind, even one from the Foreign Intelligence Surveillance Act (FISA) court established to handle subpoenas and warrants in espionage and counterterrorism cases. The crux of these provisions is to remove the "neutral and detached magistrate" so dear to the hearts of the Founders from the process of searches, seizures, and surveillance. Even where the Patriot Act requires some judicial oversight, Bovard notes, citing a *Florida Law Review* article, it "require[s] that the order be granted if the application is properly filled out," effectively negating any judicial discretion.

An executive order that President George [W.] Bush originally issued in November 2001 permits the secretary of defense to order the indefinite detention of any alien—including U.S. residents—suspected of supporting international terrorist activities. As Bovard reports in heavily footnoted detail, more than 1,200 "special interest" suspects—temporary and resident aliens—were arrested in the months after 9/11, and more than 600 were eventually deported after secret trial, but all for various immigration or petty criminal offenses: "No evidence surfaced linking any of those people to the terrorist attacks." The government refused to release the names of the detainees or to disclose the precise numbers being held. Almost all were denied access to counsel either overtly or by subterfuge (lists of available lawyers' phone numbers contained only numbers that were out of service, or detainees were only allowed their one phone call a week after business hours, when no one would be there to answer their call).

U.S. Department of Defense secretary Donald Rumsfeld and Attorney General John Ashcroft have since asserted, in the prosecution of the so-called enemy combatant case (*Hamdi v. Rumsfeld*) against Yaser Hamdi, that the Bush order extends to U.S. citizens, even if arrested here and not on a foreign battlefield. Hamdi, a Louisiana-born American captured in [Afghanistan](#), has been held incommunicado in a Navy brig in Norfolk, Virginia, for more than a year after his transfer from Guantanamo Bay in Cuba.¹ As Hentoff points out, Hamdi's detention is based on a two-page declaration by a special adviser to the Defense Department that Hamdi was "affiliated with a [Taliban](#)²

unit and received weapons training." The federal district court judge presiding over a hearing in the case (which Hamdi was not allowed to attend) concluded that the declaration "makes no effort to explain what 'affiliated' means nor under what criteria this 'affiliation' justifies Hamdi's classification as an enemy combatant.... Indeed, a close inspection of the declaration reveals that [it] never claims that Hamdi was fighting for the Taliban or was a member of the Taliban...."

The administration has since made good on extending the doctrine to [Americans](#) seized in America. Jose Padilla, a U.S. citizen arrested in Chicago for purportedly plotting to detonate a [radioactive] "dirty bomb," has also been held [since May 2002] without access to counsel, in the same brig as Hamdi, after being declared an enemy combatant by President Bush. Heymann's devastating conclusion: "Quite simply, a country cannot be free if the executive retains the power, on its own determination that certain conditions are met, to detain citizens for an indefinite period." At least one court has agreed with him. On December 18, 2003, a divided panel of the U.S. Court of Appeals for the Second Circuit ruled that the "president, acting alone, possesses no inherent constitutional authority to detain an American citizen seized in the U.S., away from the zone of combat, as an enemy combatant." The court ordered the government to release, charge, or hold Padilla as a material witness within 30 days; as of this writing, the Justice Department is seeking a stay of the order and has said it will appeal.³

The Declaration of a Permanent State of Emergency

During wartime, constitutional safeguards have been repeatedly compromised on the basis of purportedly imminent threats to the body politic, from [former U.S. president Abraham] Lincoln's suspension of the writ of [habeas corpus](#) during the Civil War to the internment of Japanese Americans during World War II. Conventional wars are bounded in time and space, with beginnings and endings, fronts and rears, and the curtailment of civil liberties purportedly justified by their exigencies is usually temporary as well. But the Bush administration has defined the "war on terrorism" as a global "crusade" to "rid the world of evildoers," per the president's speech on September 16, 2001; the battlefield is global, the time frame indefinite. "For so long as anybody's terrorizing established governments, there needs to be a war," the president repeated in an October 2001 interview.

If war is perpetual, so is the danger that justifies "emergency" powers. There's no due process on the battlefield. Bovard's conclusion: "Because of the actions of a handful of [terrorists](#) on September 11, federal agents could have more power over all Americans in perpetuity.... The Bush administration carried off the biggest bait-and-switch in U.S. constitutional history. Rather than targeting terrorists, Bush and Congress awarded new powers [under the Patriot Act and the Homeland Security Act] to use against anyone suspected of committing any one of the 3,000 federal crimes on the books." Heymann's verdict is more measured, but just as damning: The administration has "carefully exploited the right to use selective enforcement of rarely used statutes and powers to act against a group or activity for purposes largely unconnected with the purposes of the Congress in passing the statute."

Short-Circuiting Democratic Decision Making

Governing is about making choices and assessing trade-offs. What are the benefits and the costs of the new post-9/11 security regime? Do the potential gains in public safety and peace of mind it promises outweigh the potential damage to democratic values and traditions it may cause? Heymann writes: "When there is a true conflict between greater security and preserving historic democratic freedoms ... we must do our best to choose wisely—not an easy assignment in times of danger and fear." The Bush administration and Congress flunked the test.

As all three authors recount, the Patriot Act was drafted in the U.S. Senate in closed-door sessions attended only by legislators handpicked by the administration. It was bulldozed through Congress without substantive hearings in four weeks, under the lash of crisis rhetoric and the threat of members being attacked as unpatriotic for countenancing any deliberation. ("The American people do not have the luxury of unlimited time in erecting the necessary defenses to future terrorist attacks ...," Ashcroft lectured the House Judiciary Committee. "Each day that passes [before the Patriot Act is enacted] is a day that terrorists have a competitive advantage. Until Congress makes these changes, we are fighting an unnecessarily uphill battle.") The congressional leadership refused to consider an alternative bill unanimously reported out by the Judiciary Committee, forcing an up-or-down, no-amendment vote on the Senate version (which was not even printed and distributed to the representatives voting to approve it, most of whom never read it).

Dismantling the Bill of Rights

The results? Hentoff: "A reckless dismantling of the Bill of Rights." Bovard: "The war on terrorism is the first political growth industry of the new millennium.... After 9/11, the Bush administration rushed to increase the power of federal agencies across the board ... result[ing] in maximum intimidation and minimum deliberation by Congress." Heymann: "What isn't permissible is the view that Attorney General Ashcroft has repeatedly enunciated: that the job of the Justice Department is to go as far as legally possible in protecting even limited amounts of security without consideration of the long-term costs in democratic freedoms.... What [the Bush administration] has sought to do is to ignore the responsibility of the executive to consider the impact of precedent and practice on the character of the country and to deny Congress and the courts the opportunity to exercise oversight. Furthermore, it has sought to deny the American people full knowledge of what is being done."...

As [former U.S. Supreme Court] Justice Robert Jackson memorably wrote in his dissent in *Korematsu v. United States*, the World War II internment case: "A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution [sanctions](#) such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes."

Hentoff, Heymann, and Bovard have made it clear that the Patriot Act and the Homeland Security Act are a loaded gun lying on the table, aimed at the heart of American democracy, ready for the hand of anyone—not just John Ashcroft or George Bush—who would fire it. The capability is there, whatever

the intentions of our current leaders. The media and the federal courts have been all too complaisant in the face of the administration's response to the threat. Lawyers, too, are officers of the court, and the last line of defense for the rule of law. We have been warned.

Footnotes

1. 1. Hamdi was captured in Afghanistan in 2001 and has been held by the United States since then. As of this writing, his case was awaiting trial by the U.S. Supreme Court.
 2. 2. The Taliban is an Islamist movement that ruled most of Afghanistan from 1996 until 2001.
 3. 3. On February 20, 2004, the U.S. Supreme Court agreed to hear the appeal.
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